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Insights

ENGLISH COURT SUPPORTS BROAD DISCRETION OF ARBITRATORS DESPITE COVID-19 AND DEBATE OVER THIRD PARTY FUNDING COSTS

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The recent Commercial Court decision in Tenke Fungurume Mining S.A. v Katanga Contracting Services S.A.S. highlights the very broad discretion that arbitrators have when it comes to making decisions concerning the conduct of an arbitration and the reluctance of the English courts to interfere with those decisions. English courts will only step in in cases where it can be shown that an arbitral tribunal has gone so wrong in its conduct of the arbitration that "justice calls out for it to be corrected".

BACKGROUND

In 2018, Tenke entered into a series of contracts with Katanga relating to the operation of a mine in the Democratic Republic of Congo. Disputes arose and, in 2020, Katanga commenced two (later consolidated) London-seated arbitrations under ICC Rules claiming over US $13m. In August 2021, the arbitral tribunal issued a final award in favour of Katanga. Tenke challenged the award under section 68 Arbitration Act 1996 on three main grounds. The first two grounds of the challenge focused on the arbitral tribunal's refusal to adjourn the arbitration for circumstances caused by COVID-19. Tenke submitted that, in refusing to grant an adjournment the arbitral tribunal failed to comply with section 33 of the Act (general duty of the tribunal) which amounted to a serious irregularity under section 68(2)(a). The third ground concerned the recoverability of third party funding costs in arbitration.

FAILURE TO ADJOURN THE ARBITRATION TO ALLOW A SITE VISIT

To advance its counterclaim, Tenke sought a site visit to inspect Katanga's works that were allegedly defective. However, its expert was not prepared to visit the site due to pandemic restrictions. Tenke requested an adjournment of the arbitral proceedings until a site visit could take place. The tribunal refused. Its final award noted that both experts eventually agreed that a site visit

would not allow a visual inspection of the areas in question and that it would not be reasonable or fair to adjourn “for the sole purpose of conducting interviews face to face on site rather than by videoconference or telephone”. The court held that the tribunal exercised its discretion having regard to the experts’ evidence on the utility of a site visit and weighed this against the effect of an adjournment.

FAILURE TO ADJOURN THE ARBITRATION NOTWITHSTANDING THE ILL-HEALTH OF TENKE’S LEAD COUNSEL

In January 2021 Tenke’s lead counsel contracted COVID-19. Tenke requested that the merits hearing, scheduled for early March, be adjourned for two months. Again, the arbitral tribunal refused. The court held that the tribunal was required to consider all the circumstances and did so. A pre-hearing conference took place on 25 January. By that date, Tenke were aware of the risk that counsel might not recover in time for the merits hearing. By 26 January (4½ weeks before the hearing) Tenke were informed that counsel would not be able to attend. The arbitral tribunal weighed up the delay of adjournment against the fact that Tenke could still appoint someone to act and would be supported by a highly experienced team of arbitration lawyers (including a senior partner with considerable experience as counsel in international arbitration). It also noted the arbitration agreement’s requirement that the arbitration be conducted “as expeditiously as possible”.

Mrs Justice Moulder dismissed the section 68 challenge on both grounds. Applying the relevant case law, she noted that the starting point was that Tenke had to show that the arbitral tribunal has gone so wrong in its conduct of the arbitration that "justice calls out for it to be corrected". In her view the arbitral tribunal exercised its discretion on both questions having regard to the evidence and there was no basis to conclude that either decision amounted to “a conclusion which no reasonable arbitrator could have arrived at”.

On this basis, there was no need for the court to decide whether the alleged irregularity had caused Tenke substantial injustice. However, Mrs Justice Moulder noted that, had she needed to decide the point, in her view Tenke had not shown that the outcome of the counterclaim "might well have been different".

RECOVERY OF THIRD PARTY FUNDING COSTS

During cost submissions after the hearing, Katanga revealed for the first time that it obtained a shareholder loan it described as a “litigation funding agreement” from a related entity controlled by a shareholder of Katanga. Katanga’s cost submissions included a claim for over US$1.5m, representing the cost of obtaining this funding. The tribunal did not allow Tenke to cross-examine Katanga on the funding arrangement and awarded Katanga more than US$1m in costs relating to the litigation funding agreement.

Tenke challenged the decision not to allow cross-examination as a procedural irregularity. The tribunal set out its reasons for refusing to allow cross-examination of witnesses on the funding

arrangement in the award. The tribunal considered that the principal issue was whether the claimed funding costs were reasonable in two respects: the type of funding and the amount. In the tribunal's view, Katanga's decision to obtain funding from a related entity was "not inherently unreasonable". It was not designed to enrich Katanga: the funding fee was payable to the related entity, which could not be conflated with Katanga. Given its financial position, it was also doubtful whether Katanga would have been able to obtain other commercial funding.

Mrs Justice Moulder held that the Tribunal was entitled to reach the conclusion that cross-examination was not necessary and that Tenke had not shown that the refusal to allow cross-examination was a decision that no arbitrator could reasonably have reached in the circumstances of the case.

Tenke also challenged the decision to award costs relating to the litigation funding as an excess of power.

Section 61 of the Arbitration Act gives the tribunal the power to make an award allocating the "costs of the arbitration" between the parties. Section 59 of the Act defines "costs of the arbitration" as including "the legal or other costs of the parties."

Tenke submitted that, when the Act was passed, no one could reasonably have thought Parliament intended that either "costs of the arbitration" or "the legal or other costs of the parties" would encompass a fee paid to a litigation funder (which is not recoverable in litigation) or costs relating to a loan taken out to pay for legal costs.

Tenke also argued that the decision in Essar Oilfields Services v Norscot Rig Management - that a litigation funding agreement was within the scope of section 59 as falling within "other costs" - was wrong and should not be followed.

Mrs Justice Moulder dismissed the challenge. Quoting Lord Steyn in Lesotho Highlands Development Authority v Impregilo SpA, she identified that the central issue is whether the tribunal "exceeded its powers" within the meaning of section 68(2)(b). This requires the court to address the question of whether the tribunal purported to exercise a power that it did not have or whether it erroneously exercised a power that it did have. If it is merely a case of erroneous exercise of power vesting in the tribunal no excess of power under section 68(2)(b) is involved.

Interestingly, Mrs Justice Moulder did not go further, as the Court had in Essar, in finding in the alternative that such fees were recoverable as a matter of law under section 59 of the Arbitration Act as "other costs" of the parties.

BCLP VIEW

The decision clearly illustrates the high threshold to successfully challenge an award under section 68. This has not changed in the context of COVID-19. Ultimately, the court's approach was to refrain

from interfering with the tribunal's decisions on procedural and evidential matters.

Without a doubt, the tribunal took a robust approach to managing the case, and Tenke may well have expected a more sympathetic response than it received, given the particular impact of COVID. The tribunal's decision not to allow cross-examination of some witnesses looks particularly tough on Tenke. But the fact the court decided that even such a ruling does not rise to the level of a serious irregularity in the process confirms that the English courts operate their powers of supervision of arbitral proceedings with the lightest of touches.

In rejecting Tenke's request for a site visit, the tribunal suggested that Tenke take advantage of other means of communication such as video-conferencing. In refusing to adjourn the arbitration on the grounds of the health of Tenke's leading counsel, both the tribunal's final award and the court stressed the importance of taking action "without delay". To bring a successful challenge under section 68, one must therefore have thoroughly explored its alternative courses of action when issues arise.

It is interesting that Mrs Justice Moulder declined to explicitly comment on whether third-party funding costs are recoverable as a matter of law under section 59 of the Arbitration Act as "other costs" of the parties. The Law Commission has announced that it will be conducting a review of the Arbitration Act and recommending areas of reform. Perhaps section 59 should be included in that review.

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